Lix Industries Sdn Bhd v Greenworld Industry Sdn Bhd

HIGH COURT (KUALA LUMPUR) — WINDING-UP PETITION NO D5–28–57 OF 1998
STEVE SHIM J
4 AUGUST 1998

Companies and Corporations — *Winding up — Opposition to petition — Notice of demand — Sum claimed was in respect of debts due from third party — Whether petition grounded on letter of undertaking amounted to traversion*

Companies and Corporations — *Winding up — Opposition to petition — Allegation of fraud — Whether respondent needs to furnish full and better particulars*

On 6 February 1998, Lix Industries Sdn Bhd ('the petitioner') filed a petition for winding up against Greenworld Industry Sdn Bhd ('the respondent'). Subsequently, on 30 June 1998, on the petitioner's application, the petition was amended to which the respondent tried to resist. The respondent raised two main propositions. In the first proposition, the respondent contended that the sum claimed by the petitioner was not in respect of debts due for goods sold and delivered by the petitioner to the respondent, but rather in respect of debts due from a third party, Greenworld Sdn Bhd. The respondent contended that the petition was grounded on a letter of undertaking which led to the issuance of four cheques amounting to the said sum and therefore, in the circumstances, the petitioner had traversed beyond its petition. The second proposition relates to an allegation of fraud on the part of David Fung, a former managing director of the respondent. The respondent relied on three documents for this proposition, namely a police report lodged by the respondent, a letter dated 17 March 1998 to the petitioner suspecting some fraud and a letter to Oriental Bank concerning the four cheques issued by the respondent.

Held, allowing the petition:

(1) The contents of the letter of undertaking were clear and precise. The respondent did not dispute the validity of the letter of undertaking nor did it dispute that the goods were delivered to Greenworld Sdn Bhd of which the respondent was a subsidiary and that the four cheques were in consideration of the goods so delivered. Given those circumstances, how then could it be said that the petitioner had traversed beyond the scope of its petition (see p 407A–B). Nevertheless, it was not an irregularity of such magnitude that it could not be cured by r 194(1) of the Companies (Winding-up) Rules 1972. The respondent had not suffered any substantial injustices or prejudice (see p 407B–C)

(2) The actual contents of the police report were not exhibited. The letter dated 17 March 1998 merely revealed that some kind of fraud was suspected. The letter to Oriental Bank merely informed

the bank that David Fung had ceased to be the authorized signatory. All these would not necessarily mean that fraud was involved. There must be full and better particulars on such a serious allegation (see pp 407F, 408A, E–F). A

[Bahasa Malaysia summary B

Pada Februari 1998, Lix Industries Sdn Bhd ('pempetisyen') telah memfailkan satu petisyen untuk penggulungan Greenworld Industry Sdn Bhd ('penentang'). Seterusnya, pada 30 Jun 1998, atas permohonan pempetisyen, petisyen tersebut telah dipinda yang mana penentang cuba menentang. Penentang telah menimbulkan dua cadangan utama. Di dalam cadangan yang pertama, penentang telah berhujah bahawa jumlah yang dituntut oleh pempetisyen bukanlah jumlah hutang barang-barang yang telah dijual dan dihantar oleh pempetisyen kepada penentang, tetapi adalah jumlah hutang pihak ketiga, Greenworld Sdn Bhd. Penentang telah berhujah bahawa petisyen tersebut adalah berdasarkan satu surat akujanji yang mana empat cek yang berjumlah sebanyak hutang tersebut telah dikeluarkan dan oleh kerana keadaan tersebut, pempetisyen telah melampaui petisyen tersebut. Cadangan kedua adalah mengenai dakwaan penipuan oleh David Fung, bekas pengarah urusan penentang. Penentang bergantung kepada tiga dokumen untuk menyokong cadangan tersebut iaitu, satu laporan polis yang telah dibuat oleh penentang, satu surat bertarikh 17 Mac 1998 yang dihantar kepada pempetisyen yang mengesyaki penipuan dan satu surat kepada Oriental Bank mengenai empat cek yang dikeluarkan oleh penentang. C D E

Diputuskan, membenarkan petisyen: F

(1) Kandungan surat akujanji adalah jelas dan tepat. Penentang tidak mempertikaikan kesahihan surat akujanji tersebut. Penentang juga tidak mempertikaikan bahawa barang-barang telah dihantar ke Greenworld Sdn Bhd yang mana penentang adalah anak syarikat dan bahawa keempat-empat cek tersebut adalah balasan penghantaran barang-barang tersebut. Oleh itu, bagaimanakah pula pempetisyen dikatakan melampaui petisyen tersebut (lihat ms 407A–B) Bagaimanapun, ia bukanlah satu kesilapan yang tidak boleh dibaiki oleh k 194(1) Kaedah-Kaedah Syarikat (Penggulungan) 1972. Penentang telah tidak mengalami sebarang ketidakadilan atau prejudis (lihat ms 407B–C). G H

(2) Isi kandungan laporan polis tersebut tidak dilampirkan. Surat bertarikh 17 Mac 1998 hanya mendedahkan bahawa satu penipuan disyaki. Surat kepada Oriental Bank hanya memaklumkan bahawa David Fung telah tidak lagi menjadi penandatangan yang diiktiraf. Semua ini tidak bermakna bahawa satu penipuan telah berlaku. Ia mestilah mempunyai butiran-butiran yang lengkap dan jelas bagi dakwaan yang seserius ini (lihat ms 407F, 408A, E–F).] I

A **Notes**

For cases on opposition to winding-up petition, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 789–806.

B **Legislation referred to**

Companies (Winding-up) Rules 1972 r 194(1)

TK Lee (*Tai King & Partners*) for the petitioner.

Sarah Aziz Abdul Ghani Aziz (*Abdul Aziz, Ong & Co*) for the
C respondent.

Steve Shim J: On 6 February 1998, Lix Industries Sdn Bhd ('the petitioner') filed a petition for winding up against Greenworld Industry Sdn Bhd ('the respondent'). On 17 March 1998, the respondent filed a summons-in-chambers for an interim stay and dismissal of the petition. The
D application was dismissed with cost. Subsequently, on 30 June 1998, on the application of the petitioner, the petition was amended. It is this amended petition which now comes before me. The respondent is resisting the petition.

There are two main propositions raised by the respondent that I think
E are worthy of consideration. Indeed, they provide the focal points upon which the other issues revolve. In advancing the first main proposition, the respondent has contended that the sum of RM289,191 claimed by the petitioner is not in respect of debt due for goods sold and delivered by the petitioner to the respondent as pleaded in para 5 of the petition but rather
F in respect of debt due from Greenworld Sdn Bhd, a third party and therefore the petition is not actually based on goods sold and delivered by the petitioner to the respondent but grounded on a letter of undertaking which has led to the issuance of four cheques amounting to the said sum of RM289,191 and thus, in the circumstances, the petitioner has traversed beyond its petition. Paragraph 5 of the petition states:

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> Syarikat tersebut berhutang kepada pempetisyen wang berjumlah RM289,191 yang merupakan jumlah yang berhutang dan kena dibayar atas barang-barang yang dipesan oleh syarikat tersebut dan dihantarserah kepada syarikat tersebut oleh pempetisyen.

H In my view, para 5 above has to be read with the letter of demand dated 22 October 1997 annexed as exh A to the petition which contains the details of how the figure of RM289,191 is computed. The letter is written by the petitioner's solicitors addressed to the respondent, the relevant part of which states:

I

> We are instructed by our client that your OBB cheques for the aggregate sum of RM289,292, being the price of goods sold and delivered by our client to you at your request, were dishonoured upon presentation for payment.

The particulars of dishonour is as follows:

Cheque	Amount	Date of Dishonour	Remark
OBB 729243	RM 30,000	03.10.97	Exceeded arrangement.
OBB 729244	RM 70,000	03.10.97	Exceeded arrangement.
OBB 729245	RM100,000	02.07.97	Payment stopped.
OBB 729246	RM 89,191	03.10.97	Exceeded arrangement.

It should perhaps be noted that the amounts when added together come up to RM289,191 and not RM289,292 as stated above. There is obviously a typing error. The subsequent letters of demand dated 12 November 1997 and 8 December 1997 have stated the correct amount of RM289,191. This sum, as can be seen in the above letter, is computed from the four cheques issued by the respondent which were dishonoured upon presentation for payment. The cheques were for the payment of goods sold and delivered to Greenworld Sdn Bhd of which the respondent was a subsidiary at all material times. Paragraph 5 must also be read with the explanatory details deposed by Leong Kim Ming, a director of the petitioner in his affidavit (encl 10), in particular paras 5 to 10 therein which state as follows:

> 5 Sememangnya pempetisyen mempunyai hubungan perniagaan dengan responden serta syarikat-syarikat subsidiarinya seperti Greenworld Sdn Bhd.
>
> 6 Dalam jangkamasa hubungan perniagaan ini satu jumlah sebanyak RM289,191 telah wujud dan dihutang oleh responden serta subsidiarinya. Salinan inbois kepada responden dan Greenworld Sdn Bhd dilampirkan di sini dan ditandakan sebagai 'eks LKM-1'.
>
> Untuk menyelesaikan hutang tersebut, pihak responden telah bersetuju dan mengakujanji untuk mengambilalih hutang Greenworld Sdn Bhd. Sesalinan surat daripada responden bertarikh 5 Mei 1997 yang berkenaan dilampirkan di sini dan ditandakan sebagai 'eks LKM-2'.
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> 8 Lanjutan daripada persetujuan dan akujanji di atas, responden telah mengeluarkan cek-cek kepada pempetisyen untuk menjelaskan hutang tersebut.
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> 9 Empat keping cek iaitu cek OBB 729243 untuk RM30,000, OBB 729244 untuk RM70,000, OBB 729245 untuk RM100,000 dan OBB 729246 untuk RM89,191 telah dikeluarkan pada masa yang sama oleh syarikat responden sebagai pengakuan hutang tersebut.
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> 10 Cek-cek tersebut diserahkan kepada wakil pempetisyen di pejabat Pengarah (iaitu Managing Director) kepada responden, iaitu David Fung Foo Fook.

It is in the light of the elaboration and explanation in the affidavits filed and the letters of demand exhibited that para 5 of the petition should be construed. It would show clearly that the sum of RM289,191 is in respect of the four cheques issued by the respondent arising from a letter of undertaking dated 5 May 1997 which states quite briefly:

> This letter serves to confirm that Greenworld Industry Sdn Bhd would undertake to pay and settle all outstanding amount owing to Lix Industries Sdn Bhd by Greenworld Sdn Bhd.

The contents of the letter are clear and precise. It is signed by David Fung, the Managing Director of the respondent. The respondent does not dispute the validity of that letter of undertaking nor does it dispute that the goods were delivered to Greenworld Sdn Bhd of which the respondent was a subsidiary and that the four cheques were in consideration of the goods so delivered. Given those circumstances, how then could it be said that the petitioner had traversed beyond the scope of its petition. I do not find such a proposition to be sustainable.

Nevertheless, even if I am wrong in coming to such a conclusion, that in fact the petitioner has gone beyond the petition, I am of the view that it is not an irregularity or a defect of such a magnitude that it cannot be cured under r 194(1) of the Companies (Winding-up) Rules 1972 because there is no substantial injustice caused to the respondent. Indeed, nothing in the affidavits filed or in the submissions of counsels for the parties concerned has it been disclosed or shown that the respondent has been prejudiced in any way by the alleged defect. Now, r 194(1) reads:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the unjustice cannot be remedied by any order of the Court.

In my view, the provisions of r 194(1) clearly apply in the instant case. I hold that the alleged defect or irregularity, if any, is formal and the respondent has not suffered any substantial injustice or prejudice as a result. In the circumstances, on that score as well, the first proposition of the respondent fails.

I come now to the second main proposition canvassed by the respondent and it relates to an allegation of fraud on the part of one David Fung, a former Managing Director of the respondent. In this connection, the respondent has quite obviously relied on three documents. The first relates to a police report allegedly lodged by the respondent. The actual contents of this report are not known as the said report has not been exhibited by the respondent. We are therefore in the dark as to whether any particular allegation was made against David Fung in the report and, if so, the circumstances involved. There is also no indication of the outcome of that report. In the circumstances there can be little, if any, evidential value, to the mere lodging of the said report.

The second document relates to a letter dated 17 March 1998 (annexed to encl 2 as exh ER-4) from the respondent to the petitioner, the relevant parts of which state as follows:

> Presently, there are other suits against our company and Greenworld Sdn Bhd (Receiver and Manager Appointed) where fraud and irregularities have been alleged for transactions and dealings which occurred during the time when David Fung was the Managing Director of our company and Greenworld Sdn Bhd (Receiver and Manager Appointed).
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> ...

> Until such time Lintrex provide us the explanation together with the supporting documents, we will have to withhold any payment which may be due to you and resist your petition and seek the necessary redress for the wrongful action taken against us.

The letter merely reveals that some kind of fraud was suspected, perhaps involving David Fung when he was the Managing Director of the respondent. It is no more than an oblique allegation of fraud. There is nothing specific about the suspicion or the allegation. It is trite law that where fraud is alleged, the accuser must condescend to particulars. There must be full and better particulars to sustain such an allegation. None is provided in this case. In the circumstances, there can be no substance or merit in the respondent's allegation.

The third document relates to another letter dated 18 March 1998 (encl 2 — exh ER-2) from the respondent to Oriental Bank concerning the four cheques issued by the respondent. The letter states:

> With reference to the telephone conversation between your En Zainal and our Ms Helen, thank you for your confirmation that Fung Foo Fook ceased being a cheque signatory to the above account on 17 June 1997.
>
> On checking our above account we note that the following cheques were dishonoured when presented for payment as these cheques bore the signature of Fung Foo Fook who had ceased to be an authorised signatory on 17 June 1997.

From the above, it would appear that the four cheques could not be honoured because David Fung had then ceased to be the authorised signatory of the cheques. Essentially that is the gist of the letter. In my view, the mere fact that David Fung had ceased to be the cheque signatory on 17 June 1997 would not necessarily mean that fraud was involved. There must be full and better particulars on such a serious allegation. In the absence of such particulars, the allegation can have little merit, if any. It is also significant to note that the police report was allegedly lodged after the petition was filed. The same applies to the two letters aforesaid. Hence, the possibility of an attempt by the respondent to salvage its case cannot be totally discounted.

In summary therefore, having regard to all the affidavits filed both in support of and in opposition to the petition and having heard the submissions of learned counsels for the parties concerned, I am of the view and I hold that the respondent has not raised any bona fide issues in dispute. Accordingly, I will allow the petition and order in terms prayed for therein.

Petition allowed.

Reported by Zahid Taib